Yong Lee Hua @ Piang Lin v Director of National Registration Sabah & Anor

HIGH COURT (KOTA KINABALU) — SUIT NO K21–29 OF 2008
ABDUL RAHMAN SEBLI J
8 SEPTEMBER 2010

Constitutional Law — Citizenship — Deprivation — Malaysian citizen wrongly issued with MyPR instead of MyKad — Whether plaintiff was Malaysian citizen by operation of law — Whether birth certificate had to be produced before plaintiff could be considered citizen — Whether first defendant had deprived plaintiff of her citizenship when it issued her with MyPR — Whether plaintiff entitled to loss and damages as claimed

On 13 February 2007, the plaintiff, an 80 year old Malaysian citizen residing in Sabah, lost her MyKad while she was out shopping. The plaintiff who was born in Sabah in 1930 had been residing in Sabah since birth. On 26 February 2007, the plaintiff applied to the first defendant for a replacement MyKad. Instead of issuing the plaintiff with a MyKad the first defendant issued her with a MyPR. The plaintiff claimed that by issuing her with a MyPR the first defendant had deprived her of her citizenship and hence the present action. The plaintiff's grievance was that the first defendant's act of issuing her with a MyPR had stripped her of her citizenship because as a permanent resident she was not able to enjoy the rights and privileges accorded to a citizen. The plaintiff claimed that due to the issuance of the MyPR she had suffered great anxiety and distress and had suffered loss and damages as particularised in her statement of claim. The defendants cited the Court of Appeal decision in *Ong Boon Hua @ Chin Peng & Anor v Menteri Hal Ehwal dalam Negeri, Malaysia* [2008] 3 MLJ 625 ('the *Ong Boon Hua* case') to argue that the plaintiff had to produce her birth certificate to prove that she was born in Sabah and before she could be considered a Malaysian citizen. The two issues for determination in this case were whether the plaintiff was a Malaysian citizen by operation of law and if so whether the first defendant had deprived her of her citizenship when it issued her with a MyPR.

Held, dismissing the plaintiff's claim with costs:

(1) The citizenship of persons residing in the States of Sabah, Sarawak and who were born in those states was dealt with specifically by art 14(1)(a) of the Federal Constitution ('Constitution'). According to the facts of the present case the plaintiff was born in Sabah in 1930, was ordinarily resident in Sabah and was a citizen of the United Kingdom and colonies

immediately before Malaysia Day, ie before 16 September 1963. Thus the plaintiff had fulfilled all the requirements to qualify as a Malaysian citizen by operation of law (see paras 9 & 15).

(2) The decision in the *Ong Boon Hua* case did not support the defendant's contention that the production of a birth certificate was a must before a person could be considered a citizen. Article 14(1)(a) of the Constitution did not impose such a condition and the Court of Appeal in the *Ong Boon Hua* case, which was not a decision on art 14(1)(a) of the Constitution, did not decide so. In any case, whether or not a person was born in Sabah or Sarawak before Malaysia Day to qualify him as a citizen by operation of law was purely a question of fact and the production of a birth certificate was only one of the ways to prove this fact; not the only way (see paras 13–14).

(3) The first defendant did not have power to revoke a person's citizenship and the power of revocation could only be exercised by the Federal Government on the grounds stated in arts 24, 25, 26 and 26A of the Constitution. In the instant case the first defendant had not taken any steps to revoke the plaintiff's citizenship and the issuance of the MyPR to the plaintiff did not deprive her of her citizenship. Although MyPRs are only issued to non-citizens, its issuance to a citizen did not deprive the citizen of his or her citizenship. On the evidence, the issuance of the MyPR to the plaintiff was due to a mistaken belief on the part of the first defendant that the plaintiff was a non-citizen and to rectify this mistake it had issued the plaintiff with a MyKad on 10 October 2008 to replace the wrongly issued earlier MyPR (see paras 17–20).

(4) After having given serious consideration to the issues raised by the plaintiff it was found that the loss and damage claimed by her was too remote to entitle her to any compensation. The plaintiff's failure to prove deprivation of her citizenship had undermined the whole substratum of her claim for damages (see para 23).

[Bahasa Malaysia summary

Pada 13 Februari 2007, plaintif, rakyat Malaysia yang berumur 80 tahun yang tinggal di Sabah, hilang MyKadnya semasa dia keluar berbelanja. Plaintif yang lahir di Sabah pada tahun 1930 telah menetap di Sabah semenjak lahir lagi. Pada 26 Februari 2007, plaintiff memohon kepada defendan pertama untuk penggantian MyKad. Defendan pertama sepatutnya mengeluarkan kepada plaintif MyKad tetapi sebaliknya mengeluarkan kepadanya kad MyPR. Plaintif menuntut bahawa dengan mengeluarkan kepadanya kad MyPR defendan pertama telah menafikannya kewarganegaraannya dan maka tindakan ini. Kilanan plaintif adalah tindakan defendan pertama mengeluarkan kepadanya kad MyPR dan melucutkan dia dengan kewarganegaraannya kerana sebagai penduduk tetap dia tidak boleh menikmati hak dan keistimewaan yang

diberikan kepada warganegara. Plaintif menuntut bahawa akibat pengeluaran kad MyPR dia telah mengalami kerisauan dan kesedihan yang amat sangat dan telah mengalami kehilangan dan ganti rugi seperti yang dibutirkan di dalam penyata tuntutannya. Defendan-defendan merujuk kepada keputusan Mahkamah Rayuan di dalam kes *Ong Boon Hua @ Chin Peng & Anor v Menteri Hal Ehwal dalam Negeri, Malaysia* [2008] 3 MLJ 625 ('kes *Ong Boon Hua*') untuk menghujah bahawa plaintif terpaksa mengemukakan surat beranaknya untuk membuktikan bahawa dia dilahirkan di Sabah dan sebelum dia dipertimbangkan kewarganegaraanya. Kedua-dua isu untuk penentuan dalam kes ini adalah sama ada plaintif adalah warganegara Malaysia mengikut undang-undang dan jika ia sama ada defendan pertama telah menafikan dia dengan kewarganegaraannya apabila ia mengeluarkan kepadanya kad MyPR.

Diputuskan, menolak tuntutan plaintif dengan kos:

(1) Kewarganegaraan seseorang yang menetap di Negeri Sabah, Sarawak dan sesiapa yang lahir di kedua-dua negeri tersebut diuruskan secara khas oleh perkara 14(1)(a) Perlembagaan Persekutuan ('Perlembagaan'). Mengikut fakta kes ini plaintif lahir di Sabah pada tahun 1930, lazimnya penduduk di Sabah dan adalah warganegara United Kingdom dan Koloni-Koloni sebelum Hari Malaysia, iaitu sebelum 16 September 1963. Oleh itu plaintif telah memenuhi kesemua kehendak untuk layak sebagai warganegara Malaysia mengikut undang-undang (lihat perenggan 9 & 15).

(2) Keputusan dalam kes *Ong Boon Hua* tidak menyokong penghujahan defendan bahawa pengemukaan sijil beranak adalah wajib sebelum seseorang dipertimbangkan sebagai warganegara. Perkara 14(1)(a) Perlembagaan tidak mengenakan syarat sedemikian dan Mahkamah Rayuan dalam kes *Ong Boon Hua*, yang mana bukan keputusan atas perkara 14(1)(a) Perlembagaan, tidak memutuskannya. Walau bagaimanapun, sama ada atau tidak seseorang lahir di Sabah atau Sarawak sebelum Hari Malaysia untuk melayakkan dia sebagai warganegara mengikut undang-undang adalah semata-mata persoalan fakta dan pengemukaan sijil beranak hanya salah satu cara untuk membuktikan fakta ini; bukan cara satu-satunya (lihat perenggan 13–14).

(3) Defendan pertama tidak mempunyai kuasa untuk membatalkan kewarganegaraan seseorang dan kuasa pembatalan hanya boleh dilaksanakan oleh Kerajaan Persekutuan atas alasan yang dinyatakan di dalam perkara 24, 25, 26 dan 26A Perlembagaan. Dalam kes ini defendan pertama tidak mengambil apa-apa langkah untuk membatalkan kewarganegaraan plaintif dan pengeluaran kad MyPR kepada plaintif tidak menafikan dia daripada kewarganegaraannya. Walaupun kad MyPR hanya dikeluarkan kepada bukan warganegara,

pengeluarannya kepada warganegara tidak menafikan warganegara tersebut kewarganegaraannya. Atas keterangan, pengeluaran kad MyPR kepada plaintif adalah akibat silap kepercayaan oleh pihak defendan pertama bahawa plaintif bukan warganegara dan untuk memperbetulkan kesilapan ini ia telah mengeluarkan kepada plaintif MyKad pada 10 Oktober 2008 untuk menggantikan kad MyPR yang dikeluarkan secara salah sebelumnya (lihat perenggan 17–20).

(4) Selepas memberikan pertimbangkan yang serius kepada isu-isu yang dibangkitkan oleh plaintif ia didapati bahawa kehilangan dan ganti rugi yang dituntut olehnya adalah tidak berkaitan langsung untuk memberikan dia hak kepada apa-apa pampasan. Kegagalan plaintif untuk membuktikan penafian kepada kewarganegaraannya telah melemahkan keseluruhan asas tuntutannya untuk ganti rugi (lihat perenggan 23).]

Notes

For cases on deprivation, see 3(1) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 1896–1899.

Cases referred to

Lim Poh Choo v Camden and Islington Area Health Authority [1980] AC 174, HL (refd)

Ong Boon Hua @ Chin Peng & Anor v Menteri Hal Ehwal dalam Negeri, Malaysia [2008] 3 MLJ 625; [2008] 5 CLJ 42, CA (not folld)

Legislation referred to

Federal Constitution arts 1(2), (3), 14(1), 24, 25, 26, 26A, 27, Second Schedule, Part I, section 2(a)

National Registration Act 1959

Rules of the High Court 1980 O 24

Martin Idang (Idang Rantau & Co) for the plaintiff.

Steve Ritikos (Senior Federal Counsel, Attorney General's Chambers) for the defendants.

Abdul Rahman Sebli J:

THE CLAIM

[1] The plaintiff's claim is for loss and damages arising from the alleged cancellation of her Malaysian citizenship by the first defendant. At the conclusion of the trial, I found her claim to be not proved despite proving that the first defendant was wrong in issuing her with a MyPR (permanent resident) instead of a MyKad (citizen). It was also my finding that the issuance of the

MyPR had not deprived the plaintiff of her citizenship.

BACKGROUND FACTS

[2] The sequence of events leading to this action can be summarised as follows. In or around 1963 the plaintiff was issued with identity card No 033213 and in 1973 she was issued with identity card No H6023337. On 14 November 1996 the first defendant issued her with a MyKad card No 300205–12–5152. By issuing her with a MyKad, the first defendant must have been satisfied that the plaintiff is a Malaysian citizen.

[3] On 13 February 2007 the plaintiff lost her MyKad when her wallet was stolen by unknown persons while she was shopping at the Servey Supermarket Penampang. On 26 February 2007 she applied for a replacement MyKad. Instead of issuing her with a replacement MyKad the first defendant issued her with a MyPR. This is the first defendant's act that gave rise to the present action which according to the plaintiff was an act of depriving her of her citizenship.

THE CENTRAL ISSUE

[4] Several issues were raised by the parties but in my view the central issue is whether the plaintiff is a Malaysian citizen by operation of law and if so whether, by issuing her with a MyPR the first defendant had deprived her of her citizenship.

Whether the plaintiff a citizen

[5] Article 14(1) of the Federal Constitution ('the Constitution') provides as follows:

> 14 (1) Subject to the provisions of this Part, the following persons are citizens by operation of law, that is to say:
>
> (a) every person born before Malaysia Day who is a citizen of the Federation by virtue of the provisions contained in Part I of the Second Schedule; and
>
> (b) every person born on or after Malaysia Day, and having any of the qualifications specified in Part II of the Second Schedule.

[6] The plaintiff's claim is that she qualifies under of art 14(1)(a) read with s 2(a) of Part I of the Second Schedule which reads:

> 2 Subject to the provisions of Part III of this Constitution, a person ordinarily resident in the State of Sabah or Sarawak or in Brunei on Malaysia Day is a citizen by operation of law if he was immediately before that day a citizen of the

A United Kingdom and Colonies, and either —

(a) was born in the territories comprised in the States of Sabah and Sarawak; or …

B **[7]** The Constitution does not specify 'Malaysia Day' but the note to art 1(2) refers to 16 September 1963 as the date Malaysia was established. The footnote to art 1(3) also refers to 16 September 1963 as Malaysia Day. It is therefore safe to say that Malaysia Day falls on 16 September.

C **[8]** To qualify as a citizen by operation of law under art 14(1)(a) of the Constitution the plaintiff must fulfill the following requirements:

(a) she was born in Sabah;

D (b) she was ordinarily resident in Sabah; and

(c) she was a citizen of the United Kingdom and colonies immediately before Malaysia Day, ie before 16 September 1963.

E **[9]** The plaintiff was 80 years old at the time she gave evidence. Despite her age I found her to be physically fit and mentally alert. Her testimony is that she was born in 1930 at Kampong Mahandoi Penampang, Sabah (then known as North Borneo) and has been residing in Kampong Nosob Penampang since birth. The identity card issued to her states her place of birth as Kampong F Mahandoi Penampang and her year of birth as 1930. These facts are not disputed. Exhibit P1 is proof that she was a citizen of the United Kingdom and colonies before Malaysia Day. It is clear therefore that the plaintiff has fulfilled all the requirements to qualify as a Malaysian citizen by operation of law.

G **[10]** The learned senior federal counsel however argued that to entitle her to a MyKad the plaintiff must produce her birth certificate failing which she cannot be considered a Malaysian citizen. The basis of the contention is that only by producing her birth certificate could the plaintiff prove that she was born in Sabah. The decision of the Court of Appeal in *Ong Boon Hua @ Chin* H *Peng & Anor v Menteri Hal Ehwal dalam Negeri, Malaysia* [2008] 3 MLJ 625; [2008] 5 CLJ 42 was cited in support. In that case Ong Boon Hua @ Chin Peng who was residing in Thailand applied, inter alia, for an order that the Minister of Home Affairs allow him to enter and live in Malaysia. He claimed that he is a Malaysian citizen.

I **[11]** The Minister of Home Affairs applied under O 24 of the Rules of the High Court 1980 ('the RHC') for an order requiring Chin Peng to file in court his birth certificate and his citizenship certificate to prove that he was born in Malaysia or was a Malaysian citizen and that if he failed to do so, for his

application to be dismissed. Chin Peng failed to comply with the court order and his application was accordingly dismissed by the High Court. He then appealed to the Court of Appeal.

[12] In dismissing Chin Peng's appeal the Court of Appeal held that the documents requested for were necessary in order to ascertain the issues of 'Malaysian citizen' or 'Malaysian origin'. Although the court delved into the question of citizenship it seems clear to me that the decision was grounded on Chin Peng's failure to comply with the disclosure order within 14 days, and not because he had or had not proved his citizenship. The question did not arise for the court's consideration. Thus whatever that the court said in relation to Chin Peng's citizenship was said en passant and does not form part of the ratio decidendi of the case. It is trite principle that a case is only authority for what it decides. Nothing more should be implied as naturally flowing from the decision.

[13] The decision in *Ong Boon Hua* clearly does not support the learned senior federal counsel's argument that production of a birth certificate is a must before a person can be considered a citizen although at first blush it appears to be so. Article 14(1)(a) of the Constitution does not impose such condition and the Court of Appeal did not so decide. It is common knowledge that there are citizens, particularly those in the rural and deep interiors of Sabah and Sarawak who do not possess any birth certificate. Documentation is a concept that is alien to them. To demand that they produce their birth certificates before they can be considered as citizens would be to perpetrate a grave injustice.

[14] In any event whether or not a person was born in Sabah or Sarawak before Malaysia Day to qualify him as a citizen by operation of law is purely a question of fact. Production of a birth certificate is but one of the ways to prove this fact. It is not the only way.

[15] It is important to note that *Ong Boon Hua* is not a decision on art 14(1)(a) of the Constitution which deals specifically with the citizenship of persons residing in the States of Sabah, Sarawak (and Brunei) and who were born in those states before Malaysia Day. Article 14(1)(a) of the Constitution was not even mentioned by the Court of Appeal. This is not surprising as the court was dealing with an O 24 application — discovery and inspection of documents — and not on any constitutional issue.

Deprivation of citizenship

[16] The plaintiff's grievance is that being a MyPR holder she was not a citizen but only a permanent resident and as such was not able to enjoy the

rights and privileges accorded to a citizen. In other words she became an alien in her own country of birth. This begs the question whether she had in fact been stripped of her citizenship.

[17] The power to revoke a citizenship lies with the Federal Government and not the first defendant and the revocation can only be ordered on grounds stated in arts 24, 25, 26 and 26A of the Constitution. The procedure for deprivation of citizenship is provided in art 27, as follows:

> 27
>
> (1) Before making an order under Article 24, 25 or 26, the Federal Government shall give to the person against whom the order is proposed to be made notice in writing informing him of the ground on which the order is proposed to be made and of his right to have the case referred to a committee of inquiry under this Article.
>
> (2) If any person to whom such notice is given applies to have the case referred as aforesaid the Federal Government shall, and in any other case the Federal Government may, refer the case to a committee of inquiry consisting of a chairman (being a person possessing judicial experience) and two other members appointed by that Government for the purpose.
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> (3) In the case of any such reference, the committee shall hold an inquiry in such manner as the Federal Government may direct, and submit its report to that Government; and the Federal Government shall have regard to the report in determining whether to make the order.

[18] In the instant case there is no evidence that the first defendant had taken any step to revoke the plaintiff's citizenship. Even if the first defendant had wanted to there is nothing in the National Registration Act 1959 (Revised 1972) ('the Act') that empowers him to do so. The preamble to the Act makes it clear that the purpose of the legislation is only to provide for registration of persons in Malaysia, the issuance of identity cards and for purposes connected therewith. Depriving one's citizenship is clearly not within the purview of the first defendant.

[19] The issuance of the MyPR to the plaintiff had nothing to do with deprivation of citizenship, much less to have such effect. It is true that MyPRs are issued to non-citizens but its issuance to a citizen does not extinguish his or her citizenship if otherwise he or she is a citizen. The fact that the plaintiff was unable to enjoy the rights and privileges of a citizen during the period she was holding the MyPR, even if true cannot be equated with deprivation of citizenship. Deprivation of citizenship can only be done in accordance with the procedure prescribed by art 27 of the Constitution. It is straining the imagination to suggest that it can be done by simply issuing a MyPR. Herein lies the fallacy of the plaintiff's argument.

[20] On the evidence I am inclined to believe that the issuance of the MyPR to the plaintiff was due to a mistaken belief on the part of the first defendant that the plaintiff is a non-citizen. What the first defendant could do to rectify the mistake was to issue the plaintiff with the correct document, on proof that she is a citizen. No citizen should be made to suffer the ignominy of being mistaken for an alien due to the authority's mistake over his or her citizenship status. Indeed the first defendant tacitly acknowledged this mistake by issuing the plaintiff with a MyKad on 10 October 2008 to replace the MyPR wrongly issued earlier.

DAMAGES

[21] The main purpose of damages in tort is to place the plaintiff in the position as if the tort had not been committed: see *Lim Poh Choo v Camden and Islington Area Health Authority* [1980] AC 174 where Lord Scarman said at p 187:

> ... compensation should nearly as possible put the party who has suffered in the same position as he would have been in if he had not sustained the wrong.

[22] The plaintiff claimed damages under several heads but having considered her evidence in support I do not find any of the claims to be substantiated. She claimed that due to the issuance of the MyPR she suffered great anxiety and distress and had suffered loss and damage the particulars of which are as follows:

(a) Her trip to Jakarta on 13 September 2008 was cancelled.

(b) Her bank accounts were frozen.

(c) Her husband fell sick and was admitted to the Sabah Medical Centre in March 2008 and she was unable to withdraw money from the bank to pay for her husband's medical expenses.

(d) She was unable to withdraw money from the bank to pay for her husband's funeral expenses.

(e) She had to borrow money from her children for the medical and funeral expenses of her late husband.

(f) She incurred travelling expenses to go to the National Registration Office.

(g) Her friends became suspicious on her status as a citizen.

(h) Her health deteriorated requiring medical attention.

[23] I have given serious consideration to the matters raised by the plaintiff but to my mind and having regard to the evidence adduced even if the loss and damage had been incurred as claimed they are too remote to entitle her to any compensation. The plaintiff's failure to prove deprivation of her citizenship has undermined the whole substratum of her claim for damages.

CONCLUSION

[24] For reasons aforesaid it is clear to me that although the plaintiff has proved that the first defendant was wrong, albeit mistakenly in issuing her with the MyPR she failed to prove any connection between her alleged loss and damage with the first defendant's wrongful act. The question of depriving her citizenship does not arise at all. The plaintiff has therefore failed to prove her claim (for damages) on the balance of probabilities. Accordingly her claim was dismissed with costs, to be taxed unless otherwise agreed.

Plaintiff's claim dismissed with costs.

Reported by Kohila Nesan